IN THE

Supreme Court Of The United States

OCTOBER TERM, 1978

No. 77-1446

SOUTHERN CAPITAL CORPORATION ..... *Petitioner*

VS.

SOUTHERN PACIFIC COMPANY, SOUTHERN PACIFIC TRANSPORTATION COMPANY, MORGAN GUARANTY TRUST COMPANY OF NEW YORK ..... *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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CITATIONS

STATUTES:

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, plaintiffs below, pray that a Writ of Certiorari issue to review the January 11, 1978, Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

On April 22, 1977, the Honorable G. Thomas Eisele of the United States District Court for the Eastern District of Arkansas, Western Division, entered an Opinion dismissing

the Complaint of plaintiffs. Said Opinion was duly appealed to the United States Court of Appeals for the Eighth Circuit which, by Opinion of Stephenson, Circuit Judge, affirmed the Federal District Court. Printed herein at Appendix "A" is the Federal District Court Opinion and at Appendix "B", the Opinion of the Eighth Circuit Court of Appeals.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

1. The Judgment handed down and entered in the United States Court of Appeals for the Eighth Circuit on January 11, 1978, is the basis for this Petition.

2. The statutory provision conferring jurisdiction on this Court is 28 U.S.C. §1254.

QUESTIONS PRESENTED FOR REVIEW

1. The justification for the enactment of the Joint Resolution of 1933 no longer exists, thereby causing that enactment to fall before the substantive due process and equal protection requirements of the Fifth Amendment.

2. The Joint Resolution of 1933 was repealed by the Gold Ownership Acts of 1974.

STATEMENT OF THE CASE

This Petition is from the affirmance of an Order of Dismissal for failure to state a claim on which relief could be granted in an action for a declaratory judgment.

At the time of the filing of the Complaint, petitioner was the owner of 175 of Southern Pacific Company's, Oregon Lines First Mortgage Bonds due March 1, 1977, one of which is reproduced in Appendix "F" which were issued

under and pursuant to a mortgage and deed of trust dated March 1, 1927, between Southern Pacific Company and National Bank of Commerce in New York, as Trustee. Southern Pacific Transportation Company, is the successor in interest to Southern Pacific Company and Morgan Guaranty Trust Company of New York is the successor trustee.

Petitioner brought suit on May 28, 1976, asking that the trial court enter a Declaratory Judgment to the effect that respondents are obligated to satisfy the remaining interest and principal payments according to the express language of the bonds. These bonds provide for all interest and principal payments to be made ". . . in gold coin of the United States of America of or equal to the standard of weight and fineness existing on March 1, 1927 . . ."

BASIS FOR FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

The Federal District Court had jurisdiction of this cause pursuant to 28 U.S.C. §2201.

ARGUMENT

Within days after his inauguration in 1933, President Roosevelt began taking steps to extricate the country from the grip of a major depression by relieving the nation and its citizens from obligations under the gold standard then in existence. Numerous measures were passed to this effect by a subservient congress within a few months after his taking office. One of those measures was the Joint Resolution of 1933, found in Appendix "C" herein, which attempted to abrogate the effect of "gold clauses" by making obligations having such provisions redeemable dollar for dollar by any legal tender, such obligations being satisfied otherwise only by the payment of a value of the promised payment in gold coin, regardless of the number of dollars called for.

The Joint Resolution was upheld in regard to "gold clauses" in private contracts due to the economic circumstances the country found itself in and the interference the existence of "gold clauses" was found to have with the power of Congress to regulate the value of the currency, *i.e.*, to devalue the dollar. *Baltimore & Ohio R. Co.*, 294 U.S. 240, 55 S.Ct. 40 (1935).

Neither of these stated reasons have any bearing upon the continuing validity of the Joint Resolution today. Our economic situation has improved dramatically since the depression of the early 1930's and Congress regularly employs indexing devices in modern legislation in order to combat the erosion caused by inflation.[1] This country has

[1] 5 U.S.C. Sec. 8340; 5 U.S.C. 8146a; 10 U.S.C. Sec. 1401a; 22 U.S.C. Sec. 1121; 22 U.S.C. Sec. 1064; 50 U.S.C. Sec. 403 note; 16 U.S.C. Sec. 460u-12; 42 U.S.C. Sec. 1761; 42 U.S.C. Sec. 3045f; 45 U.S.C. Sec. 231b; 12 U.S.C. Sec. 85; 12 U.S.C. Sec. 1730e; 15 U.S.C. Sec. 687; 12 U.S.C. 1831a.

been off the gold standard for several years and gold no longer has any influence on the value of our currency. To emphasize this point, Congress, by the enactment of P.L. 95-147 on October 28, 1977, found in Appendix "D" herein, has once again legitimatized gold clauses in relation to contracts entered into after passage of that measure.

The Eighth Circuit Court of Appeals reply to this argument was:

> "We are persuaded that the Congressional power to establish a uniform monetary system which existed in 1933 and provided a basis upon which the Supreme Court upheld the constitutionality of the Joint Resolution in 1934 still exists today. Accordingly, we reject Southern Capital's first argument."

It is not the power of Congress to establish a uniform monetary system that is under attack here, but rather it is the continued interference by gold clauses with that power that is questioned by this argument.

The principle of "Cessante Ratione Legis, Cessat Et Ipsa Lex" (where the reason for the law abates, so does the law itself) finds particular application here. In *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 44 S.Ct. 405 (1924) rent controls established in the time of emergency were challenged and struck down on the basis that the emergency no longer existed. The Court found that even though Congress did have the power to take the action it did at the time it did, such a justification had no bearing upon the validity of the exercise of that power when the facts upon which the exercise of that power is based have changed.

This principle was applied in *Newton v. Consolidated Gas Company*, 258 U.S. 165, 42 S.Ct. 264 (1922) where a

statutory rate that had been held valid by the Supreme Court in regard to conditions that had existed previously was held confiscatory for 1918 and 1919. The Supreme Court has consistently applied this principle to circumstances similar to the one before the Court on this petition.[2]

The Joint Resolution substantially altered the value of existing contracts, a result that would have caused it to fall before the substantive due process requirements of the Fifth Amendment had not the economic justification been coupled with the interference of indexing devices. Today, Congress itself has taken the position that gold clauses do not interfere with its power to establish a uniform monetary system by the elimination of the restrictions of the Joint Resolution as it pertains to recent obligations containing gold clauses; the restoration of the freedom of the American citizen to once again own and deal in gold; and the use of indexing devices to protect against the ravages of inflation, the same purpose for which the gold clause was inserted in the bonds involved in this petition. Petitioners invoke the substantive due process requirements and the right to equal protection under the law of the Fifth Amendment and seek to have their contractual rights treated equally with the beneficiaries of the measures enacted by Congress which contain indexing devices; with those individuals who may now enter into enforceable contracts containing gold clauses identical to those contained in the bonds at issue; and with all other Americans who are free to enforce their contractual rights according to the tenor

[2] **Leary v. United States,** 395 U.S. 6, 89 S.Ct. 1532 (1969); **Nashville, C & St. S. R. Co. v. Walters,** 294 U.S. 405, 55 S.Ct. 486 (1935); **Block v. Hirsh,** 256 U.S. 135, 41 S.Ct. 458 (1921); **Communist Party of United States v. SACB,** 367 U.S. 1, 81 S.Ct. 1357 (1961); **Abie State Bank v. Weaver,** 282 U.S. 765, 51 S.Ct. 262 (1931); **Perrin v. United States,** 232 U.S. 478, 58 L. Ed. 561 (1914).

of the instruments creating such rights where such enforcement does not interfere with the laws of our land.

The second argument presented here, is that the Eighth Circuit Court of Appeals erred in holding that the gold ownership acts of 1974, found at Appendix "E" herein, did not repeal the Joint Resolution of 1933.

This argument presents an important federal question which has not previously been decided by the Supreme Court. There are now outstanding at par value 731.2 million dollars of bond obligations and a substantial measure of other obligations, such as 99 year leases, that contain gold clauses similar to that found in petitioner's bond. Enforceability of these gold clauses would be restored by a favorable ruling in this Court.

The gold ownership acts of 1974 restored to Americans the right to own and deal with gold, without restriction. The enforcement of gold clauses can certainly be said to be a form of dealing with gold and, as such, should no longer be constrained by the provisions of the Joint Resolution, enacted 45 years ago, at a time when the private ownership of gold was forbidden.

The general terms of these acts bespeak the all-encompassing reach that was intended. Reference is made to other laws not specifically mentioned in the acts indicating that Congress was aware that there were other laws in existence that interfered with the freedom granted. These acts allow citizens of this country to ". . . otherwise deal in gold . . ." without interference from the prohibitions of previously passed legislation. This right given is in no way restricted elsewhere in these acts and if Congress had wished to limit this freedom, it is presumed that it would have done so in regard to such an obvious restriction as

that imposed by the Joint Resolution of 1933. Indeed, as the legislative history of the gold ownership acts indicates, Congress was aware at the time of passage of these acts of the restrictions of the Joint Resolution on the new right meant to be granted and presumably because other laws imposed other restrictions on this right, it lumped them all together in the term ". . . no provision of any law . . .", thereby sweeping them all away. Again, if Congress had meant to restrict this right in any way, it would have done so.

The equities of this petition are manifest in that the issuers of these gold clause obligations should not be allowed to benefit from this windfall at the expense of petitioner and other "gold clause" bond owners.

CONCLUSION

Petitioner contends, prays and asks this Court to grant this Writ of Certiorari; reverse the decision of the Eighth Circuit Court of Appeals in this cause, and enter an Order for Declaratory Judgment to the effect that the gold clauses found in the bonds involved here are enforceable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of the foregoing Petition were mailed to Mr. Robert V. Light, 20th Floor, First National Building, Little Rock, Arkansas 72201 and Mr. W. J. Williams, 2200 Worthen Bank Building, Little Rock, Arkansas 72201, this 4th day of April, 1978.

/s/ James F. O'Hara

APPENDIX

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

SOUTHERN CAPITAL CORPORATION ..... *Plaintiff*

v. No. LR-76-C-166

SOUTHERN PACIFIC COMPANY, SOUTHERN PACIFIC TRANSPORTATION COMPANY, MORGAN GUARANTY COMPANY OF NEW YORK ..... *Defendants*

ROY GENE SANDERS ..... *Intervenor*

MEMORANDUM OPINION AND
ORDER OF DISMISSAL

Plaintiff, Southern Capital Corporation, is the holder of 175 $10,000 bonds of the Southern Pacific Company, issued on March 1, 1927, and having a maturity date of March 1, 1977. The bonds contain a "gold clause," which provides for payment of the principal and interest "in gold coin of the United States of America of or equal to the standard of weight and fineness existing on March 1, 1927 . . . ." On May 28, 1976, plaintiff commenced this diversity action against the issuer of the bonds and the trustee for the security on the bonds, seeking to compel them to pay the principal and accumulated interest in gold coin as provided in the gold clause.[1] Roy Gene Sanders, a holder of similar bonds, has been permitted to intervene as a plain-

[1] Under the gold clause, defendants would be required to pay the quantity and fineness of gold which would have amounted to $10,000 in 1927. The present worth of such gold would be substantially in excess of $10,000.

tiff. Defendants have moved to dismiss the complaints for failure to state a claim upon which relief can be granted. For reasons which follow, defendants' motion is granted.

Defendants' motion to dismiss is predicated on the Joint Resolution of June 5, 1933, 31 U.S.C. §463, in which Congress declared gold clauses to be against public policy, and provided that all such obligations "shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts." The Joint Resolution was held to be constitutional in *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240 (1935). Plaintiffs contend that the Joint Resolution was repealed by the Act of Congress which lifted the ban on private ownership of, and dealing with, gold, effective December 31, 1974:

> "(b) No provision of any law in effect on the date of enactment of this Act, and no rule, regulation, or order in effect on the date subsections (a) and (b) become effective may be construed to prohibit any person from purchasing, holding, selling, or otherwise dealing with gold in the United States or abroad."

Pub. L. 93-373, 88 Stat. 445 (1974).

Alternatively, plaintiffs contend that continuing the ban against the enforcement of gold clauses contravenes due process.

Since the effective date of the 1974 Act, two federal courts have considered its impact on gold clauses, and have concluded that the Act did not repeal the Joint Resolution. *Feldman v. Great Northern Ry. Co.*, No. 76 Civ. 2837 (S.D. N.Y. March 16, 1977); *Equitable Life Assur. Soc. of U. S. v. Grosvenor*, 426 F. Supp. 67 (W.D. Tenn. 1976). They reasoned that there was no express repeal since the Act failed

to specifically mention the Joint Resolution although it did mention two other restrictions on private dealings in gold. *See* Pub. L. 93-110, 87 Stat. 352 (1973, *as amended*; Pub. L. 93-373, 88 Stat. 445 (1974), *repealing* 31 U.S.C. §§442-43 (1970). They further reasoned that the 1974 Act could not be viewed as impliedly repealing the Joint Resolution since repeal by implication is not favored and may be found only when the earlier and later statutes are irreconcilable. See *Morton v. Mancari*, 417 U.S. 535, 549-51 (1974). The court in *Equitable Life* stated:

> "The Repealing Act is a statute which was intended to again allow citizens to buy, sell, hold and deal with gold as a commodity but not to use it as an index of value to measure obligations. The two statutes are not irreconcilable. Citizens may now deal with gold as a commodity — buying, selling and holding it, contracting on futures and generally dealing with it as they would cotton or other commodities. However, Congress did not repeal the prohibition against its use as an index of value to measure obligations unrelated to their dealings in it."

426 F. Supp. at 72.

Finally, the court in *Feldman* noted that the few references to this issue in the legislative history underlying the 1974 Act indicate that the Act was not intended to repeal the Joint Resolution. In response to an inquiry by Senator Johnston, chairman of the Senate Subcommittee considering private ownership of gold, Deputy Undersecretary of the Treasury Jack F. Bennett submitted a letter stating:

> "Any decision to repeal the Gold Clause Joint Resolution would have to be based on consideration of its effect on our economy from both a domestic and

international view point. Repeal would also have to be reviewed in the light of its effect on the ability of Congress to regulate the value of money of the United States — the original reason for the adoption of the Resolution.

"It seems unlikely at the present time the private market price for gold, which is quite volatile, would be used by creditors and debtors in their contracts. However, our preliminary view is that it would seem at least technically possible for private contracts to use the monetary price of gold as an index for determining payment in dollars. In time, contractual clauses of this kind could conceivably become a serious burden on ordinary citizens if contracts using the monetary price of gold as an index became widespread, for example, in lease and mortgage agreements. They might also result in private citizens having a vested interest in the monetary gold price, and this could run counter to our overall national objective of diminishing the role of gold in the international monetary system. Finally, such clauses, if contained in a large number of contracts, might impair the constitutional power of Congress to regulate the value of money.

"Consequently, based on these preliminary concerns, repeal of the Gold Clause Joint Resolution should not be undertaken by the Congress without a thorough consideration of all the issues and consequences involved. Since neither the hearings before your Subcommittee nor the debates on other gold legislation pending in the Senate have focused on the gold clause issue, we believe that it would be inadvisable to include the Joint Resolution among the gold laws which are proposed to be repealed by Congress.

"I would also like to point out in this connection that there is no inconsistency between private gold ownership and a restriction on the enforceability in our courts of gold clause provisions in contracts. For example, a number of foreign nations which permit private gold ownership by their citizens impose various restrictions on gold clauses and other similar contractual provisions. Such countries include Germany, France, Canada, Belgium, Luxembourg and The Netherlands.

"*As we interpret them, the bills now before Congress on private gold ownership, although broadly phrased, are limited to holding and dealing in gold and do not affect the Gold Clause Joint Resolution.* [Emphasis added]

Hearings on Private Ownership of Gold Before a Subcommittee of the Senate Committee on Banking, Housing and Urban Affairs, 93d Cong., 1st Sess. 55-56 (1973).

In later hearings before a House Subcommittee, Secretary of the Treasury William Simon testified:

> "Contracts payable alternatively in gold or in an amount of money measured thereby are both against public policy and unenforceable in our courts under the provisions of the Congressional Gold Clause Joint Resolution of 1933. *This clause continues to apply after the lifting of restrictions on bullion ownership.*" [Emphasis added]

Hearings on H.R. 17475 Before the Subcommittee on International Finance of the House Committee on Banking and Currency, 93d Cong., 2d Sess. 7 (1974).

The Court finds the reasoning employed in *Feldman* and *Equitable Life* to be persuasive, and, on that basis, holds that the 1974 Act did not repeal the Joint Resolution of 1933.

As to their constitutional claim, plaintiffs contend that Congress' authority to void existing gold clauses derived from the economic circumstances existing in 1933, that those circumstances no longer exist, and that particularly since private ownership of gold is now permitted, the continued invalidation of gold clauses is arbitrary and in violation of due process. Plaintiffs' argument misconceives the legislative and constitutional bases for the Joint Resolution. While the Supreme Court, in *Norman v. Baltimore & Ohio R.R. Co., supra,* cited the economic circumstances of the depression, problems of gold hoarding, and the newly imposed ban on private ownership of gold as justifications for the Joint Resolution, it also cited, as an independent constitutional basis for the Resolution, Congress' power to establish a uniform monetary system with parity between all forms of currency. 294 U.S. at 314-16. See *Equitable Life, supra,* at 72-73. This basis for the Joint Resolution is as valid today as in 1933. Accordingly, plaintiffs' constitutional argument is without merit.

The Court concludes that the complaints of the plaintiff and the plaintiff-intervenor should be dismissed for failure to state a claim upon which relief may be granted.

It is therefore Ordered that the complaints of the plaintiff and of the plaintiff-intervenor be, and they are hereby, dismissed.

Dated this 22nd day of April, 1977.

/s/ Garnett Thomas Eisele
United States District Judge

APPENDIX "B"

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 77-1428

SOUTHERN CAPITAL CORPORATION ..... *Appellant*

v.

SOUTHERN PACIFIC COMPANY, SOUTHERN PACIFIC TRANSPORTATION COMPANY, MORGAN GUARANTY TRUST COMPANY OF NEW YORK ..... *Appellees*

Appeal from the United States District Court
for the Eastern District of Arkansas

Submitted: November 18, 1977
Filed: January 11, 1978

Before VAN OOSTERHOUT, Senior Circuit Judge, LAY and STEPHENSON, Circuit Judges.

STEPHENSON, Circuit Judge.

Southern Capital Corporation is the owner of 175 of Southern Pacific Company's $10,000 bonds due on March 1, 1977. The bonds were issued under and pursuant to a mortgage and deed of trust dated March 1, 1927, between Southern Pacific Company and The National Bank of

Commerce in New York, as trustee. Southern Pacific Transportation Company is the successor in interest to Southern Pacific Company. Morgan Guaranty Trust Company of New York is the successor trustee. The bonds contained a "gold clause" which provides for all interest and principal payments to be made "in gold coin of the United States of America of or equal to the standard of weight and fineness existing on March 1, 1927 * * *." On May 28, 1976, appellant Southern Capital brought this action below seeking a declaratory judgment to the effect that the appellees are obligated to satisfy the remaining interest and principal payments according to the express language of the gold clause in the bonds. Upon the appellees' motion, the district court,[1] in light of 31 U.S.C. §463, dismissed Southern Capital's complaint for failure to state a claim upon which relief could be granted. Southern Capital appeals from that dismissal. We affirm.

The Joint Resolution of June 5, 1933, 31 U.S.C. §463, was one of a series of congressional measures relating to the currency arising out of a banking and monetary crisis. In the Joint Resolution Congress declared that "gold clauses" were against the public policy. Furthermore, Congress provided that all such obligations "shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts." Shortly after its passage, the Supreme Court upheld the Joint Resolution's constitutionality as to private obligations in *Norman v. Baltimore & O. R.R.*, 294 U.S. 240 (1935).[2] *Accord, Holyoke Water Power*

[1] The Honorable G. Thomas Eisele, United States District Judge for the Eastern District of Arkansas.

[2] The Supreme Court upheld the Joint Resolution's constitutionality as to governmental obligations in **Nortz v. United States**, 294 U.S. 317 (1935), and **Perry v. United States**, 294 U.S. 330 (1935).

Co. v. American Writing Paper Co., 300 U.S. 324 (1937). Thus, it would appear that the Joint Resolution bars the relief sought by Southern Capital.

Southern Capital contends, however, that because the economic circumstances that justified the passage of the Joint Resolution no longer exist, the enactment fails of its essential purpose and must fall before the substantive due process requirements of the Fifth Amendment. It cannot be questioned that the Joint Resolution of June 5, 1933, arose out of a banking and monetary crisis. The Supreme Court in *Norman v. Baltimore & O. R.R., supra,* however, did not rely solely on the economic circumstances of the depression to uphold the constitutionality of the Joint Resolution. The Court instead discussed at some length the power of Congress to establish a uniform monetary system as an independent constitutional basis for the Joint Resolution. Several years following the *Norman* decision, the Supreme Court again in *Guaranty Trust Co. v. Henwood*, 307 U.S. 247, 259 (1939), highlighted the congressional power to enact the Joint Resolution when it stated:

> These bonds and their securing mortgage were created subject not only to the exercise by Congress of its constitutional power "to coin money, regulate the value thereof, and of foreign coin," but also to "the full authority of the Congress in relation to the currency." The extent of that authority of Congress has been recently pointed out: "The broad and comprehensive national authority over the subjects of revenue, finance and currency is derived from the aggregate of the powers granted to the Congress, embracing the powers to lay and collect taxes, to borrow money, to regulate commerce with foreign nations and among

the several States, to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures, and the added express power 'to make all laws which shall be necessary and proper for carrying into execution' the other enumerated powers."

Under these powers, Congress was authorized — as it did in the Resolution — to establish, regulate and control the national currency and to make that currency legal tender money for all purposes, including payment of domestic dollar obligations with options for payment in foreign currencies. Whether it was "wise and expedient" to do so was, under the Constitution, a determination to be made by the Congress. [Footnotes omitted.]

We are persuaded that the congressional power to establish a uniform monetary system which existed in 1933 and provided a basis upon which the Supreme Court upheld the constitutionality of the Joint Resolution in 1934 still exists today. Accordingly, we reject Southern Capital's first argument.

Southern Capital's remaining arguments center around two congressional enactments in 1973 and 1974 which eliminated limitations on the right of United States citizens to purchase, hold, sell or otherwise deal in gold. It is Southern Capital's position that this legislation has repealed the Joint Resolution. Additionally Southern Capital contends that this legislation is inconsistent with the Joint Resolution and thus causes that enactment to fail of its essential purpose.

In the Act of September 21, 1973, Pub. L. No. 93-110, §3, 87 Stat. 352, Congress specifically repealed sections 3

and 4 of the Gold Reserve Act of 1934, 31 U.S.C. §§442 and 443. We note, however, that neither the Joint Resolution or its codification in 31 U.S.C. §463 is expressly mentioned. In the subsequent Act of August 14, 1974, Pub. L. No. 93-373, §2, 88 Stat. 445, Congress provided that no provisions of any law may be construed to prohibit any person from purchasing, holding, selling or otherwise dealing with gold in the United States or abroad. As it is clear that the Joint Resolution was not expressly repealed by either Act, the question remains whether it was repealed by implication.

In *Morton v. Mancari*, 417 U.S. 535, 550 (1974), the Supreme Court stated that "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." We are not persuaded in the instant case that Congress intended to repeal the Joint Resolution by the two enactments in 1973 and 1974.[3]

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[3] In **Feldman v. Great Northern Ry.**, 428 F. Supp. 979, 985-86 (S.D. N.Y. 1977), the following was stated concerning the legislative history of the enactments of 1973 and 1974:

> On May 1, 1973, in the Senate hearings considering private ownership of gold, the following brief colloquy took place between Senator Johnston, Chairman of the subcommittee, and Jack F. Bennett, Deputy Under Secretary of the Treasury:
>
> "Senator JOHNSTON. * * * If we permitted the possession of gold, would it make any further difference if we permitted its use for payment of contracts, as legal tender?
>
> Mr. BENNETT. Well, there could be technical difficulties once we permitted private ownership and allowed private trading in gold, and futures trading and so forth (sic); there might be technical difficulties in continuing restrictions on the freedom of individuals to contract in gold as they can contract in pork bellies. I think that the question, however, ought to be looked at carefully as to whether some restrictions on indexing dollar contracts in gold should be retained."

(Continued on Page 22)

We note that in the Act of October 28, 1977, Pub. L. No. 95-147, 91 Stat. 1229, Congress has now specifically made the Joint Resolution nonapplicable to obligations issued on or after October 28, 1977. If Congress had earlier intended to implicitly repeal the Joint Resolution, it is highly doubtful that the Act of October 28, 1977, would have been necessary. Additionally, this recent Act clearly expresses the congressional intent to make the Joint Resolution nonapplicable to obligations issued *on or after* October 28, 1977. We are unable to find an earlier congressional intention to repeal the Joint Resolution.

Furthermore, the Joint Resolution and the two enactments of 1973 and 1974 are not irreconcilable. The Joint Resolution prohibited obligees from demanding payment of

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(Continued from page 21)

Pursuant to Senator Johnston's suggestion, Bennett did consider the question further and wrote to Senator Johnston on May 16, 1973, saying in part:

> "Any decision to repeal the Gold Clause Resolution would have to be based on consideration of its effect on our economy from both a domestic viewpoint. Repeal would also have to be reviewed in the light of its effect on the ability of Congress to regulate the value of money of the United States — the original reason for the adoption of the Resolution.
>
> ★ ★ ★
>
> Consequently based on these preliminary concerns, repeal of the Gold Clause Resolution should not be undertaken by the Congress without a thorough consideration of all the issues and consequences involved. Since neither the hearings before your Subcommittee nor the debates on other gold legislation pending in the Senate have focused on the gold clause issue, we believe that it would be inadvisable to include the Joint Resolution among the gold laws which are proposed to be repealed by Congress.
>
> ★ ★ ★

(Continued on page 23)

obligations in gold. The two latter enactments were concerned with the removal of restrictions imposed on the acquisition, holding and disposition of gold as a commodity. Thus, it appears that the Joint Resolution was not implicitly repealed by the enactments of 1973 and 1974. *Feldman v. Great Northern Ry.*, 428 F. Supp. 979, 984-86 (S.D. N.Y. 1977); *The Equitable Life Assurance Soc'y of the United States v. Grosvenor*, 426 F. Supp. 67, 71-72 (W.D. Tenn. 1976).

We further reject Southern Capital's contention that the 1973 and 1974 legislation is inconsistent with the Joint Resolution. In our view there is no basic inconsistency in granting persons permission to purchase, sell, hold or otherwise deal with gold, while denying them the right to demand payment of obligations indexed to a certain value of gold. The statutes can coexist.

(Continued from page 22)

> As we interpret them, the bills, the bills now before Congress on private gold ownership, although broadly phrased, are limited to holding and dealing in gold **and do not affect the Gold Clause Joint Resolution.** It would be helpful if the report of your Subcommittee explaining the objectives of these bills made this interpretation explicit through a statement to the effect that the proposed gold legislation would in no way affect the continuing validity of the Joint Resolution of June 5, 1933."

While the committee did not respond to the suggestion that the report explicitly reaffirm the continuing validity of the Gold Clause Resolution, there was no indication anywhere else in the hearings or committee reports that Bennett's interpretation was rejected or even questioned. The matter was not explicitly addressed either way.

(Continued on page 24)

We affirm the district court's dismissal of Southern Capital's complaint for failure to state a claim upon which relief could be granted.

Affirmed.

(Continued from page 23)

Over a year and a half later, on December 4, 1974, Secretary of the Treasury Simon testified before the House subcommittee considering delaying the effective date of the Gold Ownership Amendments:

> "Contracts payable alternatively in gold or in an amount of money measured thereby are both against public policy and unenforceable in our courts under the provisions of the Congressional Gold Clause Joint Resolution of 1933. **This clause continues to apply after the lifting of restrictions on bullion ownership."**

Here again, there is no indication of congressional rejection of the Secretary's interpretation, or even any discussion of it. (Footnotes omitted.)

APPENDIX "C"

"Joint Resolution"

"To assure uniform value to the coins and currencies of the United States.

"Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

"Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is

legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

"(b) As used in this resolution, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations."

APPENDIX "D"

P.L. 95-147

(c) The joint resolution entitled "joint resolution to assure uniform value to the coins and currencies of the United States," approved June 5, 1933 (31 U.S.C. 463), shall not apply to obligations issued on or after the date of enactment of this section.

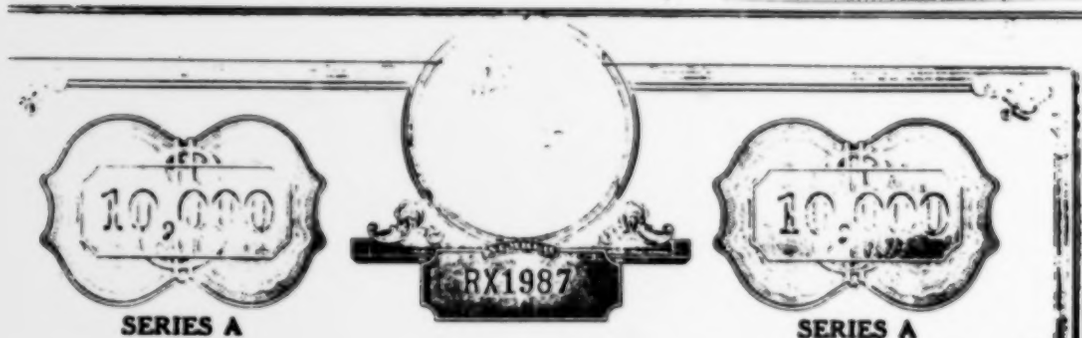
APPENDIX "E"

88 STAT. 445

Sec. 2. (b) No provision of any law in effect on the date of enactment of this Act, and no rule, regulation, or order in effect on the date subsections (a) and (b) become effective may be construed to prohibit any person from purchasing, holding, selling, or otherwise dealing with gold in the United States or abroad.

(c) The provisions of subsections (a) and (b) of this section shall be in effect either on December 31, 1974, or at any time prior to such date that the President finds and reports to Congress that international monetary reform shall have proceeded to the point where elimination of regulations on private ownership of gold will not adversely affect the United States' international monetary position.

APPENDIX "F"



SERIES A SERIES A

UNITED STATES OF AMERICA STATE OF KENTUCKY

SOUTHERN PACIFIC COMPANY

OREGON LINES FIRST MORTGAGE BOND DUE MARCH 1, 1977

SOUTHERN PACIFIC COMPANY (hereinafter called the Company), a corporation of the State of Kentucky, for value received, hereby promises to pay to

SOUTHERN CAPITAL CORP

or registered assigns, on March 1, 1977, the sum of

——— TEN THOUSAND DOLLARS, ———

in gold coin of the United States of America of or equal to the standard of weight and fineness existing on March 1, 1927, at the office or agency of the Company in the Borough of Manhattan, in The City and State of New York, and to pay interest thereon at the rate of four and one-half per cent. per annum, from March 1 or September 1, as the case may be, next preceding the date hereof (unless this Bond be dated March 1 or September 1, and in that event from date), at said office or agency, in like gold coin, semi-annually, on March 1 and September 1, in each year.

Both the principal and the interest of this Bond are payable without deduction for any tax, assessment or other governmental charge (except any Federal income tax) which the Company or the Trustee hereinafter mentioned may be required to pay thereon, or to retain therefrom, under any present or future law of the United States of America, or of any State, county, municipality or other taxing authority therein.

This Bond is one of a duly authorized issue of Bonds, coupon and registered, of the Company, limited to the aggregate principal amount of One Hundred Million Dollars ($100,000,000) at any one time outstanding, known as its Oregon Lines First Mortgage Bonds, all issued and to be issued under and in pursuance of, and all equally secured by, a mortgage and deed of trust, dated as of March 1, 1927, made and entered into between the Company and National Bank of Commerce in New York, as Trustee, and to which reference is hereby made for a statement of the property and franchises mortgaged, the nature and extent of the security, the rights of the holders of Bonds under the same, and the terms and conditions upon which the Bonds are secured.

The Bonds of this Series "A" are, at the option of the Company, redeemable as a whole, but not in part, on any semi-annual interest date up to and including March 1, 1972, at 105 per cent of their principal amount, and thereafter on any semi-annual interest date at a premium equal to one-half of one per cent. of such principal amount for each six months between the date designated for redemption and the date of maturity, in either case together with accrued interest and on previous notice given by publication, as provided in said mortgage and deed of trust, at least once a week for four successive weeks in a daily newspaper of general circulation in the Borough of Manhattan, in The City and State of New York, the first publication to be not less than sixty nor more than ninety days prior to the redemption date specified in such notice.

In case an event of default as defined in the said mortgage and deed of trust shall happen, the principal of the Bonds may be declared, or may become, due and payable, in the manner and with the effect provided in the said mortgage and deed of trust.

No recourse for the payment of the principal of or the interest on this Bond or any part thereof or for any claim based thereon or otherwise in respect thereof or of the indebtedness represented thereby or of the said mortgage and deed of trust, shall be had against any officer, director or stockholder, as such, past, present or future, of the Company or of any successor corporation, either directly or through the Company, or any such successor corporation, whether by virtue of any statute or constitutional provision or by the enforcement of any assessment or otherwise, all such liability, now existing or hereafter created, being by the acceptance hereof and as part of the consideration of the issue hereof expressly waived and released.

This Bond is transferable by the registered owner hereof in person, or by his duly authorized attorney, on the books of the Company at its office or agency in the Borough of Manhattan, in The City and State of New York, upon surrender and cancellation of this Bond, and, thereupon, a new registered Bond without coupons will be issued to the transferee in exchange herefor; or at the option of the registered owner hereof, this Bond may be surrendered for cancellation in exchange for coupon Bonds of the denomination of $1,000 for the same aggregate principal amount and bearing all unmatured coupons and of the same series, and any such coupon Bond may, in turn, be exchanged for a like amount of the principal thereof in registered Bonds without coupons; all as provided in said mortgage and deed of trust, and on payment, in any such case, if the Company shall so require, of the charge therein provided for.

This Bond shall not be entitled to any benefit under the said mortgage and deed of trust, and shall not become valid or obligatory for any purpose, until it shall have been authenticated by the certificate, hereon endorsed, of the Trustee under the said mortgage and deed of trust.

IN WITNESS WHEREOF, the Company has caused this Bond to be signed by its President or one of its Vice Presidents, and its corporate seal to be hereunto affixed and to be attested by its Secretary or one of its Assistant Secretaries, as of February 19, 1976.

SOUTHERN PACIFIC COMPANY,
(DELAWARE) Successor,
by
Vice President.
Attest:
Assistant Secretary.

TRUSTEE'S CERTIFICATE

This Bond is one of the Bonds described in the within mentioned mortgage and deed of trust, dated as of March 1, 1927.

NATIONAL BANK OF COMMERCE IN NEW YORK,
Trustee,
MORGAN GUARANTY TRUST COMPANY
OF NEW YORK, Successor Trustee,
by
Authorized Officer.